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In the Supreme Court of the United States

OCTOBER TERM, 1969

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No. 451

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TRANSPORTATION UNLIMITED OF CALIFORNIA, INC., a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, MIDWEST COAST TRANSPORT, INC., RINGSBY TRUCK LINES, INC., REFRIGERATED FOODS, INC., CURTIS, INC., LITTLE AUDREY'S TRANSPORTATION CO., INC., FROZEN FOOD EXPRESS, INC. and YELLOW FREIGHT SYSTEM, INC. (Successor to Watson-Wilson Transportation Co., Inc.),

Appellees.

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On Appeal From the United States District Court for the Central District of California

o——o——o

MOTION TO AFFIRM

o——o——o

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PRIESMAN GRAPHICS—OMAHA, NEBRASKA

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CASE CITED

Interstate Commerce Commission v. U. I. Transport Company, Inc., 368 U. S. 81, 14 F. C. C. 81, 409 ..... 6, 7, 8, 10

STATUTE CITED

Sec. 10, Administrative Procedure Act, 60 Stat. 1709, Subsection (e) 4

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 451

TRANSPORTATION UNLIMITED OF CALIFORNIA, INC., a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, MIDWEST COAST TRANSPORT, INC., RINGSBY TRUCK LINES, INC., REFRIGERATED FOODS, INC., CURTIS, INC., LITTLE AUDREY'S TRANSPORTATION CO., INC., FROZEN FOOD EXPRESS, INC. and YELLOW FREIGHT SYSTEM, INC. (Successor to Watson-Wilson Transportation Co., Inc.),

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MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the appellees, Midwest Coast Transport, Inc., Ringsby Truck Lines, Inc., Refrigerated Foods, Inc. and Curtis, Inc. move that the judgment of the District Court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of the Three Judge District Court (J.S., Exhibit A), not yet reported, dismissing an action brought to set aside an Order of the Interstate Commerce Commission (J.S., Exhibit C). That Order denied a motor contract carrier permit, pursuant to Section 209 of the Interstate Commerce Act, 49 U.S.C. 309, to the appellant, Transportation Unlimited of California, Inc. (Transportation Unlimited), to transport meat, meat products, and meat byproducts, and articles distributed by packinghouses, from points in Iowa; York, Dakota City, Omaha, Fremont, and Scottsbluff, Nebraska; Huron, Sioux Falls, Watertown, Madison and Mitchell, South Dakota; Wichita, Hutchinson and Kansas City, Kansas; Chicago and Momence, Illinois; St. Paul, Minneapolis, Austin, Albert Lea and Worthington, Minnesota; and Madison, Milwaukee and Eau Claire, Wisconsin, to points in California, under continuing contracts with Hoffman Bros. Packing Company, Inc. (Hoffman) and Wilsey-Bennett Company (Wilsey), respectively.

The facts of this case are uncomplicated. In December of 1966, Transportation Unlimited applied to the Commission for the above described permit and included additionally a contract with California Marketing Cooperative. Hearing was held for two days in June of 1967 in Los Angeles, California, and for one day in July 1967, in Washington, D.C. At the hearing the application was restrictively amended so as to delete the request for authority to transport traffic under contract with California Marketing Cooperative, Inc. By Report and Order served in December of 1967, the Examiner recommended that the application be denied in its entirety (J.S., Exhibit B). Exceptions and Replies thereto were filed by the involved parties. By Decision and Order served in April of 1968 by Review Board No. 3, the Interstate Commerce Commission,

with the exception of one modification, adopted the Examiner's Report and affirmed the denial of the entire application (J.S., Exhibit C, Pg. 34). A Petition for Reconsideration requesting that the application be amended to exclude service to Wilsey-Bennett Company was seasonably filed by appellant and replied to by the protestants. By Decision and Order served in August of 1968, the Commission denied the appellant's Petition for Reconsideration (J.S., Exhibit D, Pg. 37). Next, the appellant's Petition for Waiver of the Commission's rule banning repetitive Petitions for Reconsideration, etc., by Order served in October of 1968 by the Interstate Commerce Commission, Division 1, acting as an Appellate Division, was denied. In November of 1968, the full Commission denied appellant's Petition seeking a determination that an issue of general transportation importance was involved. In December of 1968, appellant filed a Complaint in the District Court below, seeking to suspend, enjoin, annul and set aside the Decisions and Orders of the Interstate Commerce Commission. On May 12, 1969, the Three Judge District Court, as previously indicated, dismissed the appellant's appeal (J.S., Exhibit A). From that decision, appellant takes this appeal.

STATUTES INVOLVED

The statutes involved include the National Transportation Policy, Interstate Commerce Act, preceding Section 1, 49 U.S.C., preceding Section 1, Sections 203(a)(15) and 209 of the Interstate Commerce Act, 49 U.S.C. Sections 303(a)(15), 309, and Section 10 of the Administrative Procedure Act, 5 U.S.C., Section 706.

These statutes, with the exception of Section 10 of the Administrative Procedure Act, are set forth on Pages 3 and 4 of the Jurisdictional Statement and on Page 40 of the Exhibits in appellant's Jurisdictional Statement. A full restatement herein would be superfluous.

Section 10 of the Administrative Procedure Act, as pertinent here (49 U.S.C. 17(9), Subsection (e)), sets forth permissible judicial scope of review:

> "So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (a) compel agency action unlawfully withheld or unreasonably delayed; and (b) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of Sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations, the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

QUESTION PRESENTED

Whether it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument?

ARGUMENT

Section 10 of the Administrative Procedure Act limits the question of the ultimate decision herein to whether the Commission's decision that the grant of appellant's application would not be consistent with the public interest and the National Transportation Policy was rational, based on adequate

findings supported by substantial evidence of record, and in accordance with the applicable law. A cursory reading of the Commission's Reports and Orders in the light of the applicable statutory provisions of Section 203(a)(15) and Section 209 of the Interstate Commerce Act, make it evidently clear that the Commission's decision and the decision of the court below should be affirmed.

The Court below and the Commission determined that the plaintiff's action was a proposal to act as a contract carrier as defined in Section 203(a)(15)(a). This finding is not and has never been at issue. Next, the Commission, in compliance with the clear edict of Section 209(b) of the Interstate Commerce Act, proceeded to determine whether the proposed operation would be consistent with the public interest and the National Transportation Policy and as required by Section 209(b) of the Interstate Commerce Act, in reaching that determination, clearly gave consideration "to the number of shippers to be served, the nature of the services proposed, the effect which granting the permit would have upon the services of protesting carriers, the effect of a denial upon the applicant and the supporting shippers, and the changing character of shipper's requirements" (J.S., Exhibit B, particularly Pg. 30-32 and Exhibit C, Pg. 34, 35). To support the Commission's decision that to grant appellant's application would not be consistent with the public interest and the National Transportation Policy, Section 209(b) of the Interstate Commerce Act *does not* require any specific findings or a combination of findings in regard to the five listed factors of consideration. *The law only requires evidence that the Commission considered these factors in reaching its decision on the ultimate issue of consistency with public interest and the National Transportation Policy and that its decision be supported by substantial evidence.* The questions presented in the appellant's Jurisdictional Statement do not question the support of substantial evidence, but, rather: (1)

asserts that a proposal constituting contract carriage under Section 203(a)(15)(a), through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served, is entitled to demonstrate *a lesser quantum of proof* in applying the Section 209(b) factors than another applicant proposing contract carrier services as defined under Section 203(a)(15)(b), services designed to meet the distinct need of each customer; and (2) implies that the Commission's decision-making process, rather than involving a balancing of the factors set forth in 49 U.S.C., 309(b) imposed upon the appellant the burden of proof to establish the inadequacy of the existing services and deemed its failure to do so as a binding disposition of the issues. These questions presented by the appellant's Jurisdictional Statement and arguments of their substantiality are found on Pages 5, 6 and 11-19 thereof. A reading of this Court's decision in *Interstate Commerce Commission v. J-T Transport Company, Inc.*, 368 U.S. 81, 14 F.C.C. 81; 409, a definitive decision on the issues herein involved, and the pertinent Commission Reports and Orders herein will make absolutely clear the misleading interpretations and assumptions contained in appellant's statement of Questions Presented and arguments of their substantiality. Specifically addressing ourselves to these questions presented on Pages 5 and 6 of the appellant's Jurisdictional Statement, we offer the following discussion and authorities to establish that the questions presented by appellant are so unsubstantial as not to need further argument.

Question A. Appellant, throughout its Jurisdictional Statement, attempts to free itself from the holding and the principles set forth by this Court in the *J-T Transport Company* case, supra. In short, the appellant asserts that since the contract carriage involved in the *J-T Transport Company* case, supra, fell within the definition of 49 U.S.C., 303(a)(15)(b), that is, transportation service designed to meet the distinct

need of each individual customer rather than contract carriage as herein proposed under 49 U.S.C., 303(a)(15)(a), transportation service through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served, the holding and principles of the *J-I* case are not controlling of the issues herein. Under the clear and simple meaning of the statutes here involved and the language utilized by this Court in the *J-I Transport Company* case, supra, these factual distinctions emphasized by appellant are not cause for different holdings or applicable principles. It is clear from the Court's decision that the two definitions contained in Section 203(a)(15) of the Act for the purpose of making a determination whether the transportation service proposed is in the nature of contract carrier service both refer to services proposed to meet the distinct needs of individual customers. A proposal that assigns vehicles for a continuing period of time to the exclusive use is automatically, under the statute, the proposal of a distinct service. The distinct character of other service proposals to qualify as contract carrier application must be determined by the Commission. But once a proposed service falls within either of those definitions it is a proposal of distinct service, a contract carrier service. This is clearly implied in the *J-I Transport Company* decision, supra, where the Court says:

> "For it is 'the distinct need of each individual customer' that the contract carrier is designed to fill. Section 203(a)(15). *Interstate Commerce Commission vs. J-I Transport Company, Inc.*, 368 U.S. 81, 92."

It is implicit in this language and in the balance of the opinion in the *J-I Transport Company* case, supra, that criteria of Section 209(b) of the Act is equally applicable to the proposed contract carrier service whether it be a proposal falling within the definition under 49 U.S.C., 303(a)(15)(a) or within the definition under 49 U.S.C., 303(a)(15)(b). Once the nature of

the service proposed is determined to be contract carrier service, then the Commission is bound to take into consideration all of the factors mentioned in 49 U.S.C., 309(b) in reaching its determination whether or not the proposed operation would be consistent with the public interest and the National Transportation Policy. No distinction in treatment based on the type of contract carrier service proposed is contemplated by Section 209 of the Act. Both types of contract carrier service are deemed to be designed to fill the "distinct need of each individual shipper." After a proposed service is determined to be that of a contract carrier, in the words of the J-T Court, "... the 'distinct need' of shippers for the new contract carrier service must be weighed against the adequacy of the existing services." *Interstate Commerce Commission v. J-T Transport Company, Inc.*, 368 U.S. 81, 88. Consistency with the public interest and the National Transportation Policy is derived from this determination.

Question B. There is absolutely no basis for concluding that the Commission decision herein compelled appellant to meet all five factors of Section 209(b) as to each of the two shippers originally appearing in support of the application. First, there is no statement to that effect in any of the Commission Reports, and secondly, there is no indication whatever that the Examiner did not give equal consideration to each of the shippers. In fact, the Examiner devoted a full page to a discussion of each shipper's testimony and his findings clearly take note of the individual needs and desires of both shippers (J.S., Exhibit B, Pg. 7-13, and 31). After discussing these needs, the Examiner stated:

> "*Neither* shipper has shown any particular familiarity with the service afforded by existing carriers and *Hoffman* appears to have made virtually no effort to utilize those services (J.S., Exhibit B, Pg. 31)."

It appears that not only did the Examiner discuss both shippers individually but also that he singled out Hoffman specifically in regard to the use of protestants.

Question C The amendment by the appellant to exclude the services of one shipper, thereby reducing the number of shippers to be served, did not significantly change the circumstances that were before the Examiner and the Review Board for decision. As indicated under Question B, there is no evidence whatsoever that the Examiner and the Review Board did not give separate consideration to each of the shipper contracts before it. The fact that the reduction to one shipper contract would make the strongest showing under that specific criterion does not in any way dictate, as implied by appellant, that the proposed operation should then automatically be determined to be consistent with the public interest and the National Transportation Policy. When it is shown by the evidence, as herein, that the distinct service proposed is not needed by the shipper but rather that its needs can be met equally well, if not better, by the protestant common carriers which have a critical economic need for its traffic, then there is substantial evidence to support the finding that the proposed Contract Carrier Permit is inconsistent with the public interest and the National Transportation Policy.

Question D The answer is the same as given under Question A.

Question E The Commission did not compel appellant to initially establish inadequacy of the existing services. Evidence of the adequacy of the existing services to meet shipper's need was submitted by the protestants. The Examiner's Report devotes several pages to a summary of the protestant's testimony in this regard (U.S. Exhibit B, Pgs. 13-30). In referring to the shipper's failure to establish that the protestants are unable or unwilling to provide services needed by shipper,

the Examiner did no more than impose the burden upon the applicant that is specifically assigned to it by this Court in the *J-T* case, supra:

> "The proper procedure, we conclude, is for the applicant first to demonstrate that the undertaking it proposes is specialized and tailored to a shipper's distinct need. The protestants then may present evidence to show they have the ability as well as the willingness to meet that specialized need. *If that is done, then the burden shifts to the applicant to demonstrate that it is better equipped to meet the distinct needs of the shipper than the protestants.*" (I.C.C. v. J-T Transport Co., Inc., 368 U.S. 81, at Pg. 90) (Emphasis supplied)

The Commission did not indulge in a presumption. No mention of presumption is made as was specifically done by the Examiner in the *J-T* case, supra. Unmistakably, the "adequacy of existing service" is an element to be considered by the Commission in arriving at its determination of consistency with the public interest and the National Transportation Policy. *I.C.C. v. J-T Transport Company*, 368 U.S. 81, at Pg. 87, 88. The statement by the Examiner at the conclusion of his Report:

> "Protestants are authorized to provide service to most points sought by the application and some of them are transporting a portion of the involved traffic for Bennett (U.S., Exhibit B, Pg. 31)."

is obviously not a statement derived from a presumption, but from evidence presented by the protestants. It is, as the Examiner concludes, "*the record* that fails to show that the shippers have any distinct needs which can be better met by the applicant than by the protestants (U.S., Exhibit B, Pg. 31)." (Emphasis supplied)

Question 1. Review Board No. 3, in its Decision and Order, did not make any implied finding, but rather did make a

concrete and express finding that "a denial of the application will have no apparent adverse effect upon shippers in view of the available and apparently adequate service of the protestants herein" (U.S. Exhibit C, Pg. 35). When Review Board No. 3 made the aforedescribed finding, that finding became a part of the Decision and Order before this Court for review and it can therefore no longer be referred to as a non-existing finding in this matter. There is no basis to conclude that this finding did not give equal and separate consideration to each of the shippers. This implication is answered under Question B.

Question C: Clearly, the Commission gave consideration to the factor of "the changing character of the shipper's requirements." The Examiner's Report makes a specific finding in this regard:

> "And lastly, there is no evidence regarding any *significant* change in the character of either shipper's requirements that protestants would be unable or unwilling to meet" (U.S. Exhibit B, Pg. 32)." (Emphasis supplied)

The summary of testimony contained in the Examiner's Report makes it clear that if Hoffman's needs were changing they were moving in the direction of the shipper, Wilsey Bennett, whose needs were then being met satisfactorily by the existing common carrier service. This change, as noted in the Examiner's Report, is from a movement of all traffic directly to the Los Angeles plant for processing and later distribution to customers to direct shipment to customers in Los Angeles, San Francisco, etc., and its warehouse in San Francisco involving probably split deliveries (U.S. Exhibit B, Pg. 11, 12). In the same report the Examiner also noted that the shipper Wilsey Bennett's present mode of operation involves *split delivery* service from the midwest direct to customers in the Los Angeles and San Francisco areas (U.S. Exhibit B, Pg. 30) and that shipper

Wilsey-Bennett has been using common carriers for all of its traffic without a single substantiated complaint (U.S., Exhibit B, Pgs. 7-10). Thus, the Examiner concluded that there is no evidence regarding any significant change in the character of either shipper's requirements, etc.

Question H. The Decision and Order of the Commission adopted by the Three Judge Court below did not deny the appellant's substantive due process in violation of the Fifth Amendment of the Constitution. As previously indicated, there is no evidence whatsoever that the Commission's Decision and Order discriminated against the appellant in any manner whatsoever. As found by the Court below, "the decision of the Commission that granting the application would not be consistent with the public interest and national transportation was based upon adequate findings based upon substantial evidence in accordance with applicable law" (U.S., Exhibit A, Pg. 2).

CONCLUSION

It is manifest that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument and that the judgment of the Court below should be affirmed.

Respectfully submitted,

FRANCIS W. McINERNY
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Attorneys for Appellees

September, 1969

AFFIDAVIT OF SERVICE OF MOTION TO AFFIRM

STATE OF NEBRASKA)
) ss.
COUNTY OF DOUGLAS)

KENNETH P. WEINER, being first duly sworn on oath, says:

I am a citizen of the United States, residing in the City of Omaha, County of Douglas, State of Nebraska, my business address is 630 City National Bank Building, Omaha, Nebraska 68102, on the 8th day of September, 1969, I served a copy of the within Motion to Affirm on the parties in this action by placing a true copy thereof in envelopes addressed to each of the following, in accordance with Rule 33 of the Supreme Court Rules:

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and by then sealing said envelopes and depositing the same, with postage affixed, in the United States Mail at Omaha, Nebraska; that there is regular communication between the place of mailing and the places so addressed.

Kenneth P. Weiner

SUBSCRIBED in my presence and sworn to before me, this 8th day of September, 1969.

Notary Public